In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 544

MAURICE GUY BOWLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 321 F. 2d 698.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1963. A petition for rehearing was denied on September 12, 1963. The petition for a writ of certiorari was filed on October 12, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court's questioning of a government medical witness, to which no objection was taken, deprived petitioner of a fair trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on three counts charging the possession of unstamped alcoholic spirits, possession of an unregistered still, and the making of mash on premises other than an authorized distillery (26 U.S.C. 5008, 5174, 5216). Petitioner was sentenced to three years' imprisonment on one count and was placed on probation for five years on each of the remaining counts. The court of appeals affirmed (Pet. App. A).

The acts charged were not disputed. The defense was lack of mental responsibility.

Three investigators who observed petitioner and dealt with him on the date of the offenses stated that he appeared rational and normal at all times (R. 26, 31, 32, 34, 39, 45). They also testified to various statemonts made by petitioner at the time of apprehension: that he admitted living on the premises; that he told one of the investigators to turn off a gas tank being used at the still; that he asked for the return of certain items from his car; and that when asked for an explanation, he said that he had none but that his attorney "would be able to come up with something" (R. 23, 25, 30, 29, 39, 45, 40).

A neuropsychiatrist who had examined petitioner concluded that although he had some background involving epilepsy, which was confirmed by an electroencephalogram, petitioner was not in any state of epilepsy at the time of the offenses at bar (R. 51, 52-57).[1] He rested this conclusion on several factors. First, petitioner's activities in helping to set up and run the still could not have been the product of epilepsy because such actions required "elaborate and complex" mental functioning (R. 55). Second, the doctor found that during his examination, petitioner was able to recall the fact of apprehension, the fact that he was taken away but not imprisoned, and the fact of release on bail (R. 64). Although petitioner "professed gaps in memory" as to other details of the offenses, the doctor explained that such a contrasting memory would be inconsistent with a state of epilepsy since that would produce an inability to form memory (R. 53, 56). As to the alleged lapses in memory, the doctor was of the opinion that petitioner might be deliberately withholding information. The various statements made by petitioner at the time of apprehension were all indicative of a presence of mind and an awareness of what was going on (R. 52-53).

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[1] According to the doctor, petitioner's background showed a condition of "psychomotor epilepsy" which involves changes in the individual's mental awareness while seemingly carrying on normal activities. Petitioner had, in earlier years, suffered one or two attacks of "grand mal" epilepsy, which involves an actual physical seizure, extending to convulsions, falling, loss of consciousness, and so forth. There was no evidence of this type of seizure occurring in connection with the offenses at bar.

When the doctor testified as to petitioner's statement of a memory gap the court asked whether he believed petitioner. The doctor answered that a refusal to give incriminating evidence would be consistent with petitioner's personality (R. 65). The doctor testified that petitioner claimed to have had "spells" both before and after apprehension for the offenses at bar, and the court again asked whether the doctor believed petitioner's statements. The doctor replied that whether or not the spells occurred, petitioner's conduct was such as to warrant the conclusion that he was competent (R. 66). Finally, after the doctor testified that petitioner's "spottiness" of memory was "more consistent with the personality diagnosis", the court asked the witness to clarify the answer in lay terms (R. 67). The witness answered that petitioner's personality was such as to break laws without respect and withhold information. Whereupon the court asked whether this act of withholding would be deliberate, and the doctor stated that it could be (R. 68). No objection was made at any time to the court's questions.

The issue of mental responsibility was submitted to the jury under instructions which petitioner conceded below were proper (Pet. p. 17).

ARGUMENT

There is no merit to the contention that petitioner was deprived of a fair trial by the questions put to the doctor by the trial court. The questions were germane to the issue and served to clarify the facts. It

was important to a proper resolution of the issues to know whether the doctor did or did not credit petitioner's statements to the doctor. The answers came from the doctor; they were neither suggested by the judge nor improperly characterized by him. There is no doubt that a judge has power to secure clarification of medical testimony for meaningful jury presentation. It is well settled that a federal trial judge is vested with discretionary power to elicit the truth by questioning witnesses. *Glasser* v. *United States*, 315 U.S. 60, 82; *United States* v. *Stirone*, 311 F. 2d 277 (C.A. 3), certiorari denied, 372 U.S. 935; *Jordan* v. *United States*, 295 F. 2d 355 (C.A. 10), certiorari denied, 368 U.S. 975.[2] The propriety of the questions is reflected in petitioner's trial counsel's failure to object to any of them at any time.

[2] The decision in *Polisnik* v. *United States*, 259 F. 2d 951, 952-953 (C.A. D.C.), relied upon by petitioner, merely states the general principle—applicable to any factual issue—that a judge's actions must not interfere with impartial jury consideration. There the court of appeals found that the trial judge, in his charge to the jury, had given an inaccurate appraisal of the medical testimony. No such claim is made here.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1962

U. S. GOVERNMENT PRINTING OFFICE 1962 711255 — 37p